(3) Costs to the defendants in any event.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Dason & Co.*

PUBLIC PROSECUTOR v. MUTHU LINGAM

[A.C.J. (Chan J.) October 2, 1985]

[Kuala Lumpur – Federal Territory Criminal Appeal No. 1 of 1984]

Criminal Law and Procedure – Criminal breach of trust by agent – Sentence – Penal Code (F.M.S. Cap. 45), s. 490.

In this case the respondent who was a sales representative of a company was given the sum of $100,000 by the complainant so that he could open an account with the company in her name. Instead the respondent paid the money into his own savings account with the Hongkong and Shanghai Bank. It was only eight days later that the respondent put the money into the clients' account of the company after the complainant had discovered that the money had not been paid into her trading account with the company. The respondent was charged for the offence of criminal breach of trust by an agent acting as such under section 409 of the Penal Code. He was convicted and sentenced to a day's imprisonment and fined $3000 in default six months. The Public Prosecutor appealed against the inadequacy of the sentence.

Held: (1) the two factors which operate in a case of this kind are retribution and deterrence. Public interest demands that crimes of this sort must be punished severely and discouraged;

(2) the sentence of 1 day's imprisonment should be enhanced to three years. The fine is to remain.

Cases referred to:

(1) *R.* v. *Davies* (1978) 67 Cr. App R 207, 210.
(2) *R.* v. *Pugh and Rendell* [1981] Crim. L.R. 270.
(3) *Public Prosecutor* v. *Khairuddin* [1982] 1 M.L.J. 331.

CRIMINAL APPEAL.

Tan Hock Chuan (Deputy Public Prosecutor) for the appellant.

Karpal Singh for the respondent.

Cur. Adv. Vult.

Chan J. : Muthu Lingam was a sales representative of Wengkal Sdn. Bhd. Wengkal is a firm which trades in commodities. On November 12, 1981 Tan Sri Haji Mohd. Noah bin Omar gave his wife, Puan Sri Siti Amirah bt. Parawira Kasuma, a cash cheque for $100,000 so that she could use the money to trade in commodities with Wengkal. The money was given in the office of Tan Sri Haji Noah. Muthu Lingam was there. Puan Sri Siti Amirah and Muthu Lingam then went to the United Malayan Banking Corporation branch office at Jalan Tun Perak to cash the cheque. She gave the money to Muthu Lingam so that he could open an account with Wengkal in her name. Instead, Muthu Lingam paid the money into his own savings account with the Hongkong and Shanghai Bank branch office at Jalan Bukit Bintang. By so doing, he has committed the offence of criminal breach of trust by an agent acting as such under section 409 of the Penal Code. The money was eventually put into the clients' account of Wengkal but this was not done until some eight days later – on November 20, 1981. The money was only put into Puan Sri Siti Amirah's account after she had discovered that the $100,000 was not paid into her trading account with Wengkal. It was only after the discovery that Muthu Lingam, on November 20, 1981, caused an account to be opened for Puan Sri Siti Amirah as a new client of Wengkal.

Subsequently, he was charged before the Sessions Court at Kuala Lumpur for the offence of criminal breach of trust by an agent acting as such under section 409 of the Penal Code. He was convicted on January 3, 1984 and sentenced to a day's imprisonment and fined $3,000 in default six months' imprisonment. It is against the inadequacy of the length of the custodial sentence that the Public Prosecutor is now appealing.

What then is the right sentencing policy for this type of crime? "A good deal depends upon the concept of what is necessary." – said Lawton L.J. in *R.* v. *Davies.*[1] He said:

> "There are of course the classical considerations relevant to all sentences: retribution, deterrence, prevention and rehabilitation. ... At one time it was fashionable to suggest that retribution ought not to enter into sentencing policy. That opinion I think, is not held as strongly now as it was a few years ago. The reason is manifest: the courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the court's disapproval, on behalf of the community of particular types of criminal conduct."

The retributive element is an important one in the present case.

One shudders to think of what might have happened to the money had Puan Sri Siti Amirah not become suspicious. In *R.* v. *Pugh and Rendell,*[2] it was held that "dishonesty by persons

in positions of trust was all too common, and the only way to stop it was by custodial sentences. Offenders in this class of case had ample funds from which to pay fines, and would regard being fined as one of the risks of the business." In my judgment, the retributive element is very strong in this case.

I now look at the deterrent aspect of sentencing policy. It has been said that when a person is minded to commit criminal breach of trust he is not likely to be deterred by the fact that he may get five years rather than three years or six years rather than four years. "That is right," said Lawton L.J. in *Davies*, at p.210, "but what has got to be maintained is this; be they cashiers, milk roundsmen, foremen or solicitors if they are in breach of trust they will be punished and punished very severely. ... Therefore it must be made clear that anyone breaking trust must expect a severe sentence." With those words, I agree.

In *Public Prosecutor* v. *Khairuddin*,[3] Mohamed Azmi J. (as he then was) said; at p.332:

"Public interest demands that cases of this nature involving persons in positions of trust, particularly in financial institutions, must be dealt with severely, in the hope that would-be offenders would be deterred. Until it is understood by such people that the normal punishment for helping themselves to their employers' money is to be sent to prison, there will continue to be officials in commercial and cooperative banks and similar institutions, prepared to pilfer the till."

Those remarks were made in a case of criminal breach of trust by a servant under section 408 of the Penal Code. The accused in that case was a bank officer and Azmi J., after taking into account the fact that he was a first offender and that he had pleaded guilty, enhanced his sentence of a day's imprisonment to 18 months in addition to the fine of $2,000.

The charge in the present case is far more serious. Whereas, the offence under section 408 carries a maximum term of seven years' imprisonment, the offence under section 409 carries a maximum punishment of 20 years' imprisonment plus liability to fine. Section 409 says:

"409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine."

This is because no criminal could be in greater breach of trust than a public servant, banker, merchant, factor, broker, attorney or agent, acting as such.

In my judgment, the two factors which operate in a case of this kind are retribution and deterrence. Public interest demands that crimes of this sort must be punished severely and discouraged.

I have looked carefully at this matter and I have taken into account all the points made by Mr. Karpal Singh. I have borne in mind the fact that he is a first offender, but then, the solicitor in *Davies* was also a first offender and the bank officer in *Khairuddin* was also a first offender. I have also not forgotton that in the present case, fortunately, Puan Sri Siti Amirah did not lose her money.

When dealing with a case like the present one, this court has (to borrow the words of Lawton L. J.) "to remember what happens in other kinds of cases and keep a sense of proportion." (*per* Lawton L.J. in *Davies* at page 210). It is in the interest of the public and it is in keeping with the intention of the legislature as to the seriousness of the offence under section 409 of the Penal Code that a sentence which is appropriate in this case should be one of some severity.

I, therefore, enhance the sentence of one day's imprisonment to three years. Accordingly the appeal of the Public Prosecutor is allowed. The fine is to remain as it is.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

SETHIA FINANCIAL SERVICES LTD. v. NICHOLAS CHU FAI HUNG & MAK SIAU KING (as Claimant)

[O.C.J. (Zakaria Yatim J.) November 15, 1985]

[Kuala Lumpur – Originating Summons No. C44 of 1983]

Contract – Specific lien – Judgment executed on horses – Lien on horses for unpaid trainer's fees – Whether there was "right of continued possession" – Principles applicable – Contracts Act 1950, s. 123.

The plaintiff in this case obtained a judgment against the defendant for a sum of M$716,359.75. He proceeded to execute the judgment on race horses belonging to the defendant. On July 20, 1983 the plaintiff obtained an